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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ANDREW D.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES
AGENCY et al.,

Real Parties in Interest.

G034107

(Super. Ct. Nos. DP006577;
DP006578)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Donna Crandall, Judge. Petition denied.

Deborah A. Kwast, Public Defender; James Steinberg and Frank Ospino, Assistant Public Defenders, and Paul T. DeQuattro, Deputy Public Defender, for Petitioner.

Benjamin P. de Mayo, County Counsel, Dana J. Stits and Jeannie Su,
Deputies County Counsel, for Real Party in Interest Orange County Social Service
Agency.

Law Offices of Harold LaFlamme and Mari Duque for the Minors.

Rebecca N. Captain for the de facto parents, Dennis and Kim T.

* * *

Andrew D. tried for nearly two years to comply with his service plan and reunite with his sons. When the boys were removed from his custody for the last time, however, the father had run out of time. Notwithstanding his love for the boys and the older one's expressed desire to live with him, the juvenile court was not willing to take the risk of returning the children to him, and it referred their cases to a hearing at which a permanent plan will be selected for them. The Orange County Social Services Agency (SSA), joined by the de facto parents and the minors, urge us to uphold the juvenile court's order. Because substantial evidence supports the order, we deny the petition.

FACTS

In April 2002, five-year-old Andrew and five-month-old Alexander were placed into protective custody because their father, Andrew D., had been arrested for attacking the mother, Carol D., who was pregnant with their third child. The mother was mentally ill and incapable of caring for her children. The children were adjudicated dependents of the juvenile court and removed from their parents.

The father had an extensive criminal record and was on probation. A few months after the children were detained, the father enrolled in an inpatient alcohol abuse program, which was a condition of his probation. After it was completed, he regularly attended Alcoholics Anonymous (AA) meetings. He worked on his reunification plan and visited the children frequently, demonstrating a bond with them and a commitment to having them returned to his care.

Alexander was placed almost immediately after his detention with Dennis and Kim T. Andrew was initially placed there too, but his difficult behavior caused the T.'s to ask that he be placed elsewhere. He went to the home of his maternal aunt, but she also asked that he be removed. He was placed back at Orangewood Children's Home, where his behavior improved with intensive services.

By the time of the 12-month review hearing, in June 2003, Andrew had gone back to the T.'s home. The father was working on community service obligations imposed in connection with a drunk driving conviction. He attended therapy, participated in counseling with Andrew, and attended AA meetings. His visits had been liberalized to "weekend temporary releases and daily visits" with Andrew and "8 hours unmonitored visitation" with Alexander.

On August 29, SSA sent Andrew home on a 60-day trial visit. "Prior to the child's return, the WrapAround Team worked extensively with the father to have school, Boys and Girls Club, childcare and a Safety Plan in place for the family." On September 30, however, the father was arrested on an outstanding warrant for a drunk driving conviction in Riverside, which he knew about but failed to resolve. His probation officer told the social worker that "the father had two DUI(s) that were adjudicated in February 2003, and has one DUI and failure to appear pending, which requires 80 days incarceration. This is still pending." Andrew was returned to the T.'s home.

By November 7, the father had resolved his criminal matter so as to avoid incarceration, instead receiving a fine and an order to enroll in an 18-month outpatient alcohol program. The social worker returned Andrew to the father for completion of the 60-day trial visit; the juvenile court continued the 18-month hearing for both children so the completed 60-day trial visit could be assessed.

On January 7, 2004, the juvenile court returned custody of Andrew to the father. The trial visit had gone well, and Andrew was happy and thriving. On the same day, Alexander was sent to the father's home for a 60-day trial visit. The boys' sibling,

Alexandria, who was born in November 2002, visited weekly. Unfortunately, however, the social worker received reports in February that the father was drinking again and leaving the boys home alone. After investigating, SSA filed a supplemental petition as to Andrew and terminated Alexander's trial visit. The boys were returned to the T.'s home on February 25.

As amended, the supplemental petition alleged the father had left the boys alone on numerous occasions, he failed to take Andrew to counseling appointments and to attend AA meetings, he drank alcohol and became drunk on occasion, he inappropriately disciplined Andrew, and he was unable to handle the children without extensive help. The juvenile court set the jurisdictional hearing on the supplemental petition to coincide with Alexander's 18-month review hearing. Testimony began on April 21, 2004 and continued over 17 court days until June 14.

Guadalupe V. testified she lived across the hall from the father during the time he had the boys in his custody. She knew he left the boys alone because Andrew often came to her door when the father was not at home. Also, the father told her he left them home alone. She testified she saw the father drinking and intoxicated five or six times between September 2003 and January 2004. On a Saturday in February, she heard him outside his door at 6:00 a.m. She looked through her peephole and saw him fumbling with his keys and acting in a way that made her sure he was intoxicated. That is when she reported these things to SSA.

The social worker testified that Andrew consistently told her his father occasionally left him alone with Alexander. He had to feed Alexander and put him to bed, and the father had told him not to answer the door or telephone. In court, he responded, "I don't know" or "I don't remember" to questions about his father leaving him alone. The social worker felt the father was not being honest with her; she frequently caught him in lies regarding his attendance at AA meetings, counseling

appointments, and the existence of his AA sponsor. He had not yet enrolled in the court-ordered alcohol program arising out of his 2003 arrest and warrant.

Dennis T., the boys' foster father, testified he suspected the father of drinking only one time, in July 2003. When Dennis brought Alexander to the father's apartment to visit, the father would meet them downstairs. About one quarter of the time, Andrew was left alone upstairs, sometimes for as long as fifteen minutes. Although the T.'s originally had a good relationship with the father, they changed their attitude when they concluded he was being untruthful. For example, he told them he had a restricted license and could transport the boys, but they later found out he had no license and was driving illegally. When the father had both boys, he offered to let them live with the T.'s during the week and often suggested they take the boys for a visit.

Melissa Ellison was the visitation monitor for Alexandria, and she brought the baby to the father's apartment from October 2003 to January 2004. One time in November, she arrived at the apartment to find the door open, the boys inside, and the father gone. She waited for him for more than 20 minutes, when he appeared and said he had been downstairs in the laundry room. Two other times, the father came downstairs with Ellison and the baby when the visit ended, leaving the boys in the apartment alone.

Thomas Bell, the father's therapist, was generally supportive of the father, but he corroborated the father's tendency to lie; he also knew the father was driving without a license, which he characterized as a "bad decision."

The juvenile court found the allegations of the supplemental petition true, with the exception of the allegation that the father struck Andrew with a belt. The court found the father was untruthful and had a "history of dishonesty." Leaving the boys home alone presented a risk of detriment, especially because the father denied doing it. The court commented, "I don't think there are any services that exist which could address the issue of leaving the minors alone under the circumstances which presented themselves in the petition. [¶] . . . [¶] Too many bad things can happen to little children

when they are alone. I'm not prepared to take that risk.” The court removed Andrew from the father’s custody. Because he had received more than 18 months of services for both boys, the court terminated reunification services and set a hearing under Welfare and Institutions Code section 366.26.¹

DISCUSSION

The removal of Andrew under section 387 required a finding by clear and convincing evidence that “[t]here is a substantial danger to [his] physical health, safety, protection, or physical or emotional well-being” if left in parental custody and there are no reasonable means to protect him without removal. (§ 361, subd. (c)(1).) Alexander, at his 18-month review hearing, should have been returned to the father unless the juvenile court found “that the return of the child . . . would create a substantial risk of detriment to [his] safety, protection, or physical or emotional well-being” (§ 366.22, subd. (a).) The juvenile court here made these findings, and we will uphold them if they are supported by substantial evidence. (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880.)

There is substantial evidence in the record that the father was an admitted alcoholic who had started drinking again and had stopped going to AA meetings. He left the boys home alone with some frequency. He had driven the boys without a license. This evidence supports the juvenile court’s findings of danger and detriment to Andrew and Alexander.

The father argues the juvenile court should have employed a less drastic remedy by leaving the boys in his custody and providing intensive supervision and wrap-around services. He suggests that a court order admonishing him not to leave the boys alone would have been sufficient to protect them. But the evidence shows that the father was untruthful and could not be trusted to follow the court’s orders. Furthermore, he had

¹ All statutory references are to the Welfare and Institutions Code.

received intensive in-home services to help him successfully reunify with his children, to no avail. The court found the risk of return too great and chose to avert harm. (*In re Jamie M.* (1982) 134 Cal.App.3d 530, 536.)

The father pleads for a second chance, pointing out he has made substantial progress in his parenting skills and has demonstrated a deep commitment to his children. We agree that the father's efforts should be commended, but his failings are not insignificant when it comes to the safety of his children. Therefore, the juvenile court was required to follow the legislative mandate that dependent children wait no more than 18 months for their parents to reunify before moving to the permanent planning stage. (§ 366.22.) If the father continues to improve, he has the opportunity to present changed circumstances to the juvenile court by filing a petition under section 388.

DISPOSITION

The order of the juvenile court is correct. The petition is denied.

SILLS, P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.